A **MELANDAS MANUFACTURING SDN BHD**

v.

STAR CMS SECURITY SERVICES SDN BHD

B HIGH COURT MALAYA, KUALA LUMPUR
KAMALUDIN MD SAID JC
[CIVIL APPEAL NO: S-22-498-2006]
28 MARCH 2013

C ***CIVIL PROCEDURE:*** *Stay of Execution - Special circumstances - Whether shown - Appeal against money judgment - Whether inability to recover judgment sum back from plaintiff if defendant succeeded on appeal amounts to special circumstance - Whether payment of judgment sum neither destroyed substratum of appeal nor rendered appeal nugatory -* D *Whether failure to apply promptly for stay of execution worked against applicant*

The plaintiff had obtained an award of damages ('the damages order') against the defendant and, following the latter's failure to E settle the sum, had commenced winding-up proceedings against the defendant. Instead of applying in the winding-up court for the proceedings to be stayed pending the defendant's appeal against the damages order to the Court of Appeal, the defendant filed a separate suit against the plaintiff for an injunction to restrain it F from proceeding with the winding-up. In the instant suit, the defendant also applied for a stay of execution of the damages order pending the appeal. The defendant contended that as the plaintiff was under receivership, it would not be able to refund the judgment sum to the defendant if the defendant succeeded in its G appeal. The defendant claimed that its appeal to the Court of Appeal had merits and if it paid the judgment sum to the plaintiff, the substratum of the appeal would be destroyed and the appeal would be rendered nugatory.

Held (dismissing application with costs):

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(1) The defendant had failed to show the existence of special circumstances to justify the granting of a stay of execution. The subject matter was a money judgment. The plaintiff's inability to pay the defendant if the latter succeeded in the I appeal was not a special circumstance; neither was the existence of merits or strong grounds in the appeal. Being a money judgment, there was no question of the substratum of

the appeal being destroyed if a stay was not granted. The disputed quantum of money did not constitute the 'substratum' of the appeal. (paras 51, 52, 55, 56 & 57)

(2) The court was not satisfied with the defendant's contention that because the plaintiff was under receivership, it might not be able to recover the judgment sum back from the plaintiff if the sum was paid to it. Apart from the fact that that contention was not backed with credible evidence, the defendant at the time it was appointed by the plaintiff never questioned its financial position or its ability to pay the defendant for services rendered when at the time the plaintiff was already under receivership. Nine years after the receiver and manager had been appointed, the plaintiff was still in existence and had not been wound up or deemed insolvent. (paras 54 & 55)

(3) The defendant's application for stay was not made promptly after the damages order was made. It allowed more than a month to elapse before applying for the stay resulting in the plaintiff having already commenced execution proceedings against the defendant by way of winding-up. By filing a separate suit to restrain the plaintiff from continuing with the winding-up, the defendant had created a multiplicity of proceedings in respect of the same subject matter. (paras 61 & 62).

(4) The balance of justice and/or balance of convenience did not favour the defendant. Its application did not show the appeal would be rendered nugatory if stay was not granted. (paras 52 & 64)

Case(s) referred to:

Ajaib Singh v. Jeffrey Fernandez [1970] 1 LNS 4 HC ***(refd)***

Ban Lee Sdn Bhd v. Renganathan Narayanan [1998] 3 CLJ Supp 425 HC ***(refd)***

Che Wan Development Sdn Bhd v. Co-Operative Central Bank Bhd [1989] 2 CLJ 584; [1989] 1 CLJ (Rep) 366 HC ***(refd)***

Damayanti Kantilal Doshi & Ors v. Jigarlal Kantilal Doshi & Anor [2002] 8 CLJ 218 HC ***(refd)***

Davies and Another v. Powell Duffryn Associated Collieries, Limited [1942] AC 601 ***(refd)***

Flint v. Lovell [1935] 1 KB 354 ***(refd)***

Dr Quah Thong Sai v. Manonmoney Subramoney & Anor [2012] 4 CLJ 853 HC ***(refd)***

A *Kerajaan Malaysia (Jabatan Kerja Raya) lwn. Tropical Profile Sdn Bhd & Satu Lagi Kes [2010] 7 CLJ 176 CA* ***(refd)***
KMA Marketing Sdn Bhd v. MBf Leasing Sdn Bhd; Kiong Huat Transport & Engineering Construction & Anor (Third Parties) [2008] 3 CLJ 66 HC ***(refd)***
B *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC* ***(refd)***
Lai Lai Yin v. MV "Yih Shen", Owners Of And Other Persons Interested [1985] 1 LNS 121 HC ***(refd)***
Lee Kuan Yew v. Jeyaretnam Joshua Benjamin [1990] 1 LNS 78 HC ***(refd)***
Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd [2002] 3 CLJ
C *380 CA* ***(refd)***
Natseven TV Sdn Bhd v. Television New Zealand Ltd [2001] 4 CLJ 722 HC ***(refd)***
Serangoon Garden Estate Ltd v. Ang Keng [1953] 1 LNS 98 HC ***(refd)***
Syarikat Berpakat v. Lim Kai Kok [1983] 1 MLJ 406 ***(refd)***
The Annot Lyle [1886] 11 PD 114 ***(refd)***
D *Topaiwah v. Salleh [1968] 1 LNS 161 FC* ***(refd)***
Univein Sdn Bhd v. Malaysia Building Society Bhd [2003] 2 CLJ 514 CA ***(refd)***
Wu Shu Chen (Sole executrix of the estate of Goh Keng How, deceased) v. Raja Zainal Abidin Raja Hussin & Anor [1996] 2 CLJ 353 HC ***(refd)***

E **Legislation referred to:**
Courts of Judicature Act 1964, s. 73
Rules of the Court of Appeal 1994, r. 13
Rules of Court 2012, O. 56 rr. 1, 2, 4, O. 92

F *For the defendant - Pramjit Kaur; M/s Mann & Assocs*
For the plaintiff - Jason Lai; M/s Shearn Delamore & Co

Reported by Ashok Kumar

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JUDGMENT

Kamaludin Md Said JC:

[1] Enclosure 35 is the defendant's application for an order
H under s. 73 of the Courts of Judicature Act 1964 and/or under O. 92 of the Rules of Court 2012 and/or the inherent jurisdiction of court for the following order:

(i) that the execution of order dated 30 November 2012 be
I stayed pending the settlement and disposal of the defendant's appeal at the Court of Appeal;

(ii) cost in the cause;

(iii) other relief which the court deems fit and proper.

[2] The grounds of application are set out in the affidavit of Liu Kok Weng, the manager of the defendant's company affirmed on the 3 January 2013 and are summarised as follows:

(i) The defendant's appeal at the Court of Appeal will become nugatory if stay is not granted;

(ii) The payment of the judgment sum will destroy the substratum of the appeal;

(iii) There is merit in the defendant's appeal;

(iv) The plaintiff's company is under receiver;

(v) Plaintiff do not spend the judgment sum and incur any loss if stay is granted; and

(vi) Plaintiff will be unable to pay back the money in the event the defendant is successful in their appeal.

Brief Facts

[3] The plaintiff filed a claim against the defendant for negligence in respect of premises Timah Road Lot 15 Pasir Gudang, Pasir Gudang Industrial Estate. The matter proceeded with full trial in respect of liability and the High Court Judge YA Dato' Tengku Maimun binti Tuan Mat (as she then was) entered judgment for liability and found that the defendant negligent on 100% on 26 February 2009. The defendant appealed to the Court of Appeal against the decision of the YA Dato' Tengku Maimun binti Tuan Mat and defendant's appeal was dismissed with costs of RM10,000 to be paid by the defendant to the plaintiff.

[4] The plaintiff filed a notice of assessment of damages and was heard before Senior Assistant Registrar by way of evidence affidavits and Senior Assistant Registrar on 25 July 2012 allowed the assessment of damages as prayed. The Senior Assistant Registrar awarded damages in the sum of RM809,263 (ie, RM270,379 + RM346,720 + RM192,664 – RM500) together with interest from the date of judgment of 26 February 2009 until the date of full and final settlement to be paid by the defendant to the plaintiff. The defendant then filed an appeal against the decision to the judge in chambers, and the defendant's appeal in

respect of the assessment of damages was dismissed with costs of RM4,000 to be paid by the defendant to the plaintiff (the decision). Hence, defendant has filed an appeal to the Court of Appeal against the whole decision of the High Court.

Preliminary Issue By The Plaintiff

[5] At the outset the plaintiff's counsel raised a preliminary issue that defendant's application to stay the execution of the order dated 30 November 2012 is misconceived. He contended that by reading of the notice of application dated 3 January 2013, the defendant has applied to stay the execution of the order dated 3 January 2012 pending the disposal of the defendant's appeal to the Court of Appeal *vide* Civil Appeal No. W-02(IM)-16-01/2013. The order dated 30 November 2012 pertains to the decision of YA Dato' Asmabi binti Mohamad sitting as the judge in chambers in hearing the defendant's appeal against the assessment of damages made by the Senior Assistant Registrar. In this regard, the term of the order dated 30 November 2012 is that the defendant's appeal in respect of the assessment of damages be dismissed with costs of RM4,000 to be paid by the defendant to the plaintiff.

[6] In view thereof, the plaintiff submits that any execution of the order dated 30 November 2012 on the part of the plaintiff is only limited to the execution of the costs of RM4,000. In the premises, the plaintiff submits that, the only application before this court is an application to stay the execution of the costs of RM4,000. Therefore, the sole issue before this court is whether there is any justification to stay the execution of the costs of RM4,000. In this regard, the defendant's affidavit in support clearly does not provide any basis (let alone special circumstances) for this court to stay the execution of the costs of RM4,000.

[7] I rejected the plaintiff contention on this issue *in limine* because the argument does not make sense. It is very clear in the notice of appeal filed therein, the appeal is against the whole decision of the order dated 30 November 2012.

The Defendant's Application For Stay

[8] The defendant argued that stay should be granted because there is merit in the defendant's appeal. It is the defendant's case that during the assessment of damages before the Senior Assistant Registrar, plaintiff produced only three contractor's quotation and

has not shown the court that the plaintiff has paid for the cost of repairs and improvements. Damage was said to have not been repaired or paid by the plaintiff, thus the plaintiff has not suffered any loss to claim for the award of damages for property damage.

[9] The validity of quotations in the attachments of exh. WKC1 is for 45 days and the quotation is dated 6 August 2005 and thus the quotation has lapsed and of no effect.

[10] The documents adduced through Wong Kah Chiang's affidavit which belong to another contractor ie, exh. WKC2 is hearsay.

[11] As the hearing of the assessment was conducted with affidavit evidence and not by way of trial, thus it is trite law that the merit of the appeal will be a ground to consider for a stay.

[12] The defendant further submits that there are special circumstances to warrant a stay. It is pertinent to note that the plaintiff's company is under the control of receivers and thus in the event the monies are paid to the plaintiff's company, and in the event the defendant succeed in its appeal in the Court of Appeal, the plaintiff is in no position to pay the monies to the defendant.

[13] Further it is also to be noted that the plaintiff did not pay for the damages on the property and thus there is no loss to the plaintiff at this juncture. The defendant submits that this application will not prejudice the plaintiff. Thus a stay ought to be granted to maintain the *status quo*.

[14] In support of the application, the defendant relied on *KMA Marketing Sdn Bhd v. MBf Leasing Sdn Bhd; Kiong Huat Transport & Engineering Construction & Anor (Third Parties)* [2008] 3 CLJ 66 which says the plaintiff had stated that since the primary concern of the defendant was the fear that it may not recover the money paid, this court was not at liberty to order the defendant to pay into a trust account held by the plaintiff or its solicitor pending the outcome of the appeal.

[15] In *Kerajaan Malaysia (Jabatan Kerja Raya) lwn. Tropical Profile Sdn Bhd & Satu Lagi Kes* [2010] 7 CLJ 176 where it says that the disputed quantum of money may constitute the "substratum" of the appeal which would be prejudicial to the first defendant if disposed of.

The Plaintiff's Objection

[16] The plaintiff strongly objected to this defendant's application for stay of execution of the order dated 30 November 2012. The plaintiff has filed an affidavit in reply by Datuk Mohd Anwar bin Yahya affirmed on the 5 February 2013 and second affidavit in reply by Aw Geok Lan affirmed on 22 February 2013. It is the plaintiff's contention that if the intention of the defendant were to apply for a stay of execution of the judgment sum of RM809,263 plus the interest accruing thereof, the defendant ought to have applied for a stay of execution of the judgment dated 26 February 2009 read together with the order dated 8 August 2012. However, no such application was made by the defendant.

[17] As such, this court ought not be asked to go outside the "four corners" of the notice of application dated 3 January 2013 and be asked to grant a stay of execution of the judgment dated 26 February 2009 read together with the order dated 8 August 2012 – since the defendant has clearly applied for a stay of execution of the order dated 30 November 2012. On this basis alone, the defendant's notice of application dated 3 January 2013 ought to be dismissed *in limine*.

[18] I have great difficulty in understanding the argument by the plaintiff's counsel on this point of submission. To my mind, it is an established fact that the notice of appeal clearly directed to the order dated 30 November 2012. The learned judge had affirmed the decision of the Senior Assistant of Registrar in awarding damages to the plaintiff in the assessment of damages proceeding. The defendant is dissatisfied with the decision of the learned judge in chambers. Order 56 r. 1 of the Rules of Court 2012 provides that an appeal shall lie to the judge in chambers from any judgment, order or decision of the Registrar and O. 56 r. 2 allows a party to appeal against any judgment, order or decision made by a judge in chambers. The judgment dated 26 February 2009 was in relation to the finding of liability which the judge had found against the defendant and which appeal by the defendant at the Court of Appeal had been dismissed and it went before the Senior Assistant Registrar for assessment of damages. The decision on liability has been terminated and what is still in issue is the award of damages by the Senior Assistant Registrar on the 8 August 2012 read together with the order dated 30 November 2012 to which has become the subject of appeal by the defendant *vide*

their notice of appeal and hence this notice of application dated 3 January 2013 for stay against the said order. The application, in my view is properly made before this court.

[19] The plaintiff submitted that the defendant has failed to show special circumstances to justify the grant of a stay of execution. He referred to the Federal Court case of *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1 at p. 17; [2004] 1 MLJ 257 at p. 269 which says that the onus is on the applicants to demonstrate the existence of special circumstances to justify the grant of a stay of execution. The reasons must relate to the enforcement of the judgment. They must be deposed in the affidavit filed in support of the application. He also referred to the case of *Che Wan Development Sdn Bhd v. Co-Operative Central Bank Bhd* [1989] 2 CLJ 584; [1989] 1 CLJ (Rep) 366; [1989] 3 MLJ 40 at p. 40 para. I (left column).

[20] In this respect I must agree with the plaintiff reference to those cases underlying the settled principle on law governing any application for stay. In fact it is trite law that an appeal does not operate as a stay of execution as provided under s. 73 of the Courts of Judicature Act 1964, r. 13 of the Rules of the Court of Appeal 1994 and also O. 56 r. 4 of the Rules of Court 2012. It is also well established that the onus is on the defendant to show the existence of special circumstances to justify the grant of a stay of execution. (See also the case of *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* [2002] 3 CLJ 380; [2002] 3 MLJ 49).

[21] The plaintiff submits that the defendant has failed to show the existence of special circumstances to justify the grant of a stay of execution.

[22] The plaintiff further submits that there are no merits to the defendant's pending appeal on the premise that in the first place, it must be said that the defendant's pending appeal to the Court of Appeal is only in respect of the issue of assessment of damages. The defendant's liability to the plaintiff under the judgment dated 26 February 2009 can no longer be disputed. The said judgment dated 26 February 2009, being a judgment after trial, has since been unanimously affirmed by the Court of Appeal *vide* the order of the Court of Appeal dated 4 October 2011. In such a case, the plaintiff being the successful litigant ought not to be deprived of the fruits of its litigation.

[23] In support, he referred to the case of *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1; [2004] 1 MLJ 257 at p. 263 para. H, the case of *Wu Shu Chen (Sole executrix of the estate of Goh Keng How, deceased) v. Raja Zainal Abidin Raja Hussin & Anor* [1996] 2 CLJ 353; [1995] 3 MLJ 224 at p. 228 para. G, the case of *Lee Kuan Yew v. Jeyaretnam Joshua Benjamin* [1990] 1 LNS 78; [1991] 1 MLJ 83 at p. 84 paras. E – H (right column) and the case of *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* [2002] 3 CLJ 380; [2002] 3 MLJ 49 at p. 50 paras. A – B.

[24] Furthermore, the assessment of damages by the learned Senior Assistant Registrar has been affirmed by YA Dato' Asmabi binti Mohamad *vide* the order dated 30 November 2012. That being the case, the defendant's further appeal to the Court of Appeal in respect of the assessment of damages cannot be said to be meritorious.

[25] It is also a well established position in law that the appellate court is slow to interfere with the decision of the court of first instance on the issue of assessment of damages. Since assessment of damages is equated to an exercise of discretion. Therefore, the defendant's assertion that its pending appeal in the Court of Appeal is meritorious is without any basis in fact and in law.

[26] I agree with the plaintiff that the appellate court is generally slow to interfere with the decision of the court of first instance on the issue of assessment of damages. The Federal Court case of *Topaiwah v. Salleh* [1968] 1 LNS 161; [1968] 1 MLJ 284 had held that:

> The Federal Court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that the judge acted on some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled. The assessments which the courts have made over the years form some guide to the kind of figure which is proper and which the Federal Court will follow in the light of the special facts of each particular case.

[27] See also the case of *Dr Quah Thong Sai v. Manonmoney Subramoney & Anor* [2012] 4 CLJ 853; [2012] 3 MLJ 379 at p. 385 paras. B – F, the English House of Lords case of *Davies and Another v. Powell Duffryn Associated Collieries, Limited* [1942] AC 601 at pp. 616 to 617 and the English Court of Appeal case of *Flint v. Lovell* [1935] 1 KB 354 at pp. 359 to 360.

[28] In *Che Wan Development Sdn Bhd v. Co-Operative Central Bank Bhd* [1989] 2 CLJ 584; [1989] 1 CLJ (Rep) 366; [1989] 3 MLJ 40 it was held that, merits of the appeal are not special circumstances:

> In other words, grounds affecting the validity or correctness of the judgment or order appealed from are not special circumstances. Merits or strong ground for an appeal are also not special circumstances. In short, neither merits nor strong grounds for an appeal nor the validity or correctness of the judgment appealed from are special circumstances which would entitle the defendant to a stay of execution. (p. 40 para. B (right column))

[29] In the *Lai Lai Yin v. MV "Yih Shen", Owners Of And Other Persons Interested* [1985] 1 LNS 121; [1986] 2 MLJ 65, it was said that the fact that the defendants believe they have a reasonable chance of success in the appeal is no ground for granting a stay; (p. 65 para. I (left column)).

[30] The plaintiff further submits that the defendant has failed to show that the appeal would be rendered nugatory. The judgment in question is a money judgment. That being the case, it would not suffice for the defendant to argue that the appeal would be rendered nugatory simply because it might be difficult for the defendant to recover the amount paid or that there is a fear the defendant could not recover the amount paid. The established principles can be found in the case of *Ban Lee Sdn Bhd v. Renganathan Narayanan* [1998] 3 CLJ Supp 425 where it says that:

> By nugatory it means that it would deprive the applicant in this case of the fruits if the result of the appeal is in his favor. In exercising my discretion in the nature of this application, it is incumbent upon me to consider whether if the applicant succeeds in its appeal against the order of the High Court, will it make the result useless and academic in the hand of the applicant? Will it in the true sense be deprived of the fruits of its litigation? The answers must be in the negative because the subject matter involved here is money or money's worth. It may be difficult for

A the applicant to recover the amount from the respondent but that is not sufficient to construe the result of the appeal as becoming nugatory. Legal remedies will be available to the applicant against the respondent to recover the amount. (p. 427 para. f to h)

(emphasis added)

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[31] In the case of *Univein Sdn Bhd v. Malaysia Building Society Bhd* [2003] 2 CLJ 514; [2003] 4 MLJ 618 it says as follows:

In para 18, the appellants presented another point as to special circumstances, which was inconsistent with the nugatoriness point. They said to the effect that if the lands were sold presently, in view of the economic downturn brought about by the Asian economic crisis the lands would fetch a much lower price than their actual market value. It was a fear of financial loss. It was a point of dollars and cents.

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A matter disclosed by the appellants' counsel before their other counsel entered upon his actual substantive submission on their stay application on 18 February 2003 convinced me that the point of nugatoriness of appeal was not at all the concern of the appellants and that their real concern was as to dollars and cents, which concern they expressed in para 18 of their affidavit. (p. 621 para. I to p. 622 para. B) (emphasis added)

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[32] In the case of *Wu Shu Chen (Sole executrix of the estate of Goh Keng How, deceased) v. Raja Zainal Abidin Raja Hussin & Anor* [1996] 2 CLJ 353; [1995] 3 MLJ 224 the court held:

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In *Eng Yam Construction Sdn Bhd v. TAP Properties Sdn Bhd* digested in *2 Mallal's Digest* (4th Ed, 1994 Reissue) para 1363, the applicant there alleged that the award involved a large sum of money and that if such sum was paid to the respondent, the applicant might not be able to recover it in the event that the action was successful. Abdul Hamid J in dismissing the application held, *inter alia*, that the fact that a large amount of money was involved did not constitute special circumstances. (p. 227 para. I to p. 228 para. B)

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H **[33]** Again in the case of *Che Wan Development Sdn Bhd v. Co-Operative Central Bank Bhd* [1989] 2 CLJ 584; [1989] 1 CLJ (Rep) 366; [1989] 3 MLJ 40 it was said:

Again there is no evidence which has been deposed to an affidavit which would enable this court to find that if a stay is not granted the appeal if successful would become nugatory. All that has been shown, and this is stated in the defendant's para 4 of its affidavit, is that if the defendant succeeded in its appeal, it would face

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inconvenience in having to bring proceedings against the 11 purchasers. In other words, the appeal, if successful would not be nugatory. Inconvenience there is no doubt, but not nugatory. (p. 46 para. C – D (left column))

[34] It was submitted that in this regard, the defendant did not adduce any credible or concrete evidence to show that it would not be able to recover the amount paid in the unlikely event of a successful appeal. In *Che Wan Development Sdn Bhd*, apart from merely contending that the plaintiff is an insolvent company and would not be able to pay damages in the event of the defendant's appeal succeeding, the defendant did not in its affidavit supporting the application for a stay of execution adduce any evidence to show that is so. No evidence has been adduced in its affidavit to show that the plaintiff is an insolvent company and would therefore not be in a position to pay damages in the event of the defendant's appeal succeeding.

[35] In *Wu Shu Chen (Sole executrix of the estate of Goh Keng How, deceased)*, Mr Wong Kim Fatt, the learned counsel for Raja Zainal Abidin, hit the point when he forcefully submitted that the affidavit of the applicant in encl. 41 did not advert to credible or concrete evidence of dissipation of RM25,892,000 in the event that sum was held by Raja Zainal Abidin. The allegation of dissipation of assets was a mere speculation and that cannot be special circumstances, so submitted Mr Wong Kim Fatt. He next argued that to lock up the money which Raja Zainal Abidin was entitled to must surely be a grave prejudice and, consequently, the stay ought not to be granted. The court strongly felt that the applicant failed to establish by affidavit evidence that Raja Zainal is insolvent and therefore would not be in a position to reimburse RM25,892,000 and to pay damages in the event the applicant succeeds in her appeal. Unless evidence is adduced to the contrary, the court must assume that Raja Zainal Abidin is not insolvent and this assumption is clearly borne out by his affidavit in encl. 45. The general proposition that the court will not deprive a successful party of the fruits of his litigation until an appeal is determined, unless the unsuccessful party can show special circumstances to justify it, must be vigorously applied to Raja Zainal Abidin (*Serangoon Garden Estate Ltd v. Ang Keng* [1953] 1 LNS 98; [1953] MLJ 116; *The Annot Lyle* [1886] 11 PD 114; and *Syarikat Berpakat v. Lim Kai Kok* [1983] 1 MLJ 406). (p. 228 paras. C-E)

[36] It is the plaintiff's case that the defendant in its affidavit in support has merely made the following bare averments:

> 8.4 syarikat Plaintif adalah di bawah penerima;
>
> 8.6 Plaintif tidak berupaya untuk membayar balik saya sekiranya rayuan Defendan di Mahkamah Rayuan dibenarkan dan rayuan dibenarkan.

[37] It is the plaintiff counsel's submission that at the time of the defendant's appointment to provide the security services to the premises (ie, on 13 April 2004 – approximately nine years ago), a receiver and manager has already been appointed for the plaintiff. The defendant had never questioned the financial position of the plaintiff or the plaintiff's ability to pay the defendant for the security services rendered. Furthermore, the plaintiff is still in existence more than nine years after the receiver and manager has been appointed and/or has not been wound up and/or deemed insolvent. The plaintiff's reply to the averments of the defendant can be found in the exh. "AY1" of the plaintiff's affidavit in reply by Datuk Mohd Anwar bin Yahya.

[38] In view of the aforesaid, the plaintiff submits that the defendant has failed to show that the appeal would be rendered nugatory if a stay of execution is not granted – let alone showed that there are special circumstances to justify a stay of execution (which is a higher threshold than merely showing that the appeal would be rendered nugatory). The judgment in question being a money judgment, there is also no issue of the substratum of the appeal being destroyed if a stay of execution is not granted.

[39] The defendant had submitted that a stay of execution ought to be granted to preserve the *status quo* between the parties. The plaintiff submitted that the issue of preserving the *status quo* of the parties does not arise. In his submission he says that the *status quo*, as it stands, is that the defendant is liable to the plaintiff for the loss and damage to the premises arising from the defendant's breach of contractual duties and negligence in providing security services to the premises. This liability of the defendant can no longer be disputed pursuant to the order of the Court of Appeal dated 4 October 2011. Therefore, it goes without saying that the defendant will definitely have to pay damages to the plaintiff pursuant to the judgment dated 26 February 2009 (as affirmed by the order of the Court of

Appeal dated 4 October 2011). The only issue in the pending Court of Appeal is the amount of damages that the defendant has to pay to the plaintiff.

[40] The judgment being a money judgment – there is also no issue of preserving any *status quo* between the parties. The defendant's fear of financial loss (in the event the defendant could not recover the amount paid – which the plaintiff denied) does not equate to any change in the *status quo* of the defendant. In any event, the fact that a litigant could not be restored to his original position if his appeal succeeds is not sufficient ground on its own to justify the grant of a stay of execution.

[41] In *Serangoon Garden Estate Ltd v. Ang Keng* [1953] 1 LNS 98; [1953] 19 MLJ 116, the appeal was brought against an order of the district court granting a stay of execution in a possession case pending appeal. It was held that:

> The granting of a stay of execution, though discretionary, should be exercised on correct principles. The fact that the defendant cannot be restored to his original position if his appeal succeeds is not a sufficient ground. It might be an important factor to be taken into consideration if there were other grounds, for example, that there were merits in the appeal.

[42] The final point of submission by the plaintiff in objecting to the stay application is when he says that the defendant failed to make the application for stay of execution promptly which I think it is quite a pertinent point for consideration.

[43] It is the plaintiff's contention that an application for a stay of execution must be made promptly. In *Ajaib Singh v. Jeffrey Fernandez* [1970] 1 LNS 4; [1971] 1 MLJ 139, the respondent applied for an order to stay the proceedings before the disciplinary committee appointed by the learned Chief Justice of Malaya under the Advocates and Solicitors Ordinance, 1947 to enquire into a complaint of unprofessional conduct against the respondent. The evidence before the court disclosed that the learned Chief Justice's order, appointing the committee was made on 9 April 1970 and the respondent did not make his application to set it aside until 1 June 1970. His application was dismissed on 10 June

A 1970, but he did not appeal against the order of dismissal until 19 July 1970, nor did he make any proper application to stay proceedings earlier than 17 August 1970. The court held that:

> The respondent's application for stay of proceedings had not been promptly made and he had not satisfied the court that serious or irreparable injury would result to him if the stay was not granted, and therefore, the application must be dismissed.

(See also the Court of Appeal case of *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* [2002] 3 CLJ 380; [2002] 3 MLJ 49 at p. 58 paras. G – I).

[44] The defendant did not make the application for a stay of execution promptly after the order dated 30 November 2012 was made. Instead, the defendant allowed a period of more than a month to elapse before filing the notice of application dated 3 January 2013 herein. Just as important, the defendant did not prosecute this notice of application dated 3 January 2013 promptly.

[45] Instead, the defendant has seen fit to commence a separate suit *vide* Kuala Lumpur High Court Civil Suit No. S-22NCVC-24-01/2013 for the purpose of obtaining an injunction to restrain the plaintiff from commencing any winding up proceeding.

[46] It is further submitted that the failure of the defendant to make the application for stay of execution promptly has resulted in the plaintiff having already commenced execution against the defendant by way of winding up proceedings. Furthermore, with the commencement of a separate suit by the defendant for an injunction to restrain the plaintiff from commencing winding up proceedings, this has brought about multiplicity of proceedings in respect of the same subject matter, as follows:

(i) the winding up petition *vide* Kuala Lumpur High Court Companies (Winding Up) No. 28NCC-27-01/2013 – wherein the defendant ought to have applied to the winding up court for a stay of the winding up proceedings instead of commencing a separate suit for an injunction or to belatedly prosecute the notice of application dated 3 January 2013 herein (to which the effect could lead to a stay of the winding up proceedings);

(ii) the Kuala Lumpur High Court Civil Suit No. S-22NCVC-24-01/2013 wherein the defendant has sought to obtain the aforementioned injunction to restrain the winding up proceedings; and

(iii) the notice of application dated 3 January 2013 *vide* Kuala Lumpur High Court Suit No. S-22-498-2006 herein for a stay of execution.

[47] In view thereof, the plaintiff submits that the defendant's failure to make the application for stay of execution promptly and the defendant's action of commencing a separate suit for injunctive relief, which in turn brought about multiplicity of proceedings, constitute an abuse of process of the court. The case on points are the case of *Natseven TV Sdn Bhd v. Television New Zealand Ltd* [2001] 4 CLJ 722; [2001] 4 AMR 4648 at p. 4650 line 1-25.

[48] In the case of *Damayanti Kantilal Doshi & Ors v. Jigarlal Kantilal Doshi & Anor* [2002] 8 CLJ 218; [2001] 6 MLJ 417 at p. 435 para. G to p. 436 para. C (MLJ) it was held that:

> (3) There has been a lapse of more than one year since the last proceeding in this action and accordingly the plaintiffs were obliged to give notice of intention to proceed before moving for the *ex parte* injunction. Since the requirement of O. 3 r. 6 of the RHC is mandatory, failure to comply warrants a setting aside or striking off of the action. There was no plausible reason for the plaintiffs not to comply with the requirements of O. 3 r. 6 of the RHC and hence the court was justified in concluding that a breach of same in the factual matrix of this case could not be termed a mere technical non-compliance of procedural rules amounting to an irregularity (see pp. 433F-G, 435A).
>
> (4) The conduct of the plaintiffs in instituting several proceedings in respect of the same subject matter was an abuse of process and therefore the interlocutory injunction could not be allowed to stand (see p. 436B–C).

[49] In the premises, the plaintiff prays that the defendant's application *vide* the notice of application dated 3 January 2013 be dismissed with costs.

Decision Of The Court

[50] After hearing both counsels for the plaintiff and the defendant argument and after reading their written submissions and the affidavits by the applicant/defendant and the affidavit in reply by the respondent/plaintiff filed herein, I dismissed the

application for an order for stay of the execution of order dated 30 November 2012 pending the settlement and disposal of the defendant's appeal at the Court of Appeal as in encl. 35 with cost.

[51] I agree with the submission of the plaintiff counsel that the law is trite in *Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* [2002] 3 CLJ 380; [2002] 3 MLJ 49) that the onus is on the defendant to show the existence of special circumstances to justify the grant of a stay of execution.

[52] I agree with the plaintiff that this case, the subject matter involved here is money or money's worth. The affidavit of the defendant in support of the application is insufficient to construe the result of the appeal as becoming nugatory. The case of *Ban Lee Sdn Bhd v. Renganathan Narayanan* [1998] 3 CLJ Supp 425, is correctly referred to by the plaintiff. In fact Abdul Hamid J in dismissing the application held, *inter alia*, that the fact that a large amount of money was involved did not constitute special circumstances. There must be credible or concrete evidence to show that it would not be able to recover the amount paid in the unlikely event of a successful appeal as correctly said in *Wu Shu Chen (Sole executrix of the estate of Goh Keng How, deceased) v. Raja Zainal Abidin Raja Hussin & Anor* [1996] 2 CLJ 353; [1995] 3 MLJ 224 and *Che Wan Development Sdn Bhd v. Co-Operative Central Bank Bhd* [1989] 2 CLJ 584; [1989] 1 CLJ (Rep) 366; [1989] 3 MLJ 40.

[53] The defendant counsel relying on the case of *KMA Marketing Sdn Bhd v. MBf Leasing Sdn Bhd; Kiong Huat Transport & Engineering Construction & Anor (Third Parties)* [2008] 3 CLJ 66 is correct as far as the principal of law to be followed. However this case does not support her because in that case the court after reading the affidavits, this court was satisfied that the defendant had demonstrated special circumstances to consider and, if deem fit, to grant a stay with or without any terms and from the evidence adduced, there was a real threat that if the payment were made to the plaintiff there was a likelihood that in the event the defendant succeeded he may not be able to recover the sum.

[54] The defendant main concern here as stated in paras. 8.4 and 8.6 of the affidavit in support of the application is that the plaintiff is under the control of receiver which it may be difficult for the applicant to recover the amount from the plaintiff in the

event the defendant appeal is allowed by the Court of Appeal. The fear by the defendant is they might not recover the money from the plaintiff because the receiver might utilise it for purposes of paying up the creditors. I am not satisfied with such contention because apart from it is not substantiated with credible evidence, the defendant had never questioned the financial position of the plaintiff or the plaintiff's ability to pay the defendant for the security services rendered at the time of the defendant's appointment to provide the security services to the premises. (See exh. "AY1" of the plaintiff's affidavit in reply by Datuk Mohd Anwar bin Yahya).

[55] The plaintiff is still in existence more than nine years after the receiver and manager has been appointed and/or has not been wound up and/or deemed insolvent. Therefore, I am of the opinion that the inability to pay the defendant in the event they succeed is not likely, thus not special circumstances for the court to consider granting the order for stay.

[56] It is clearly stated in *Che Wan Development Sdn Bhd v. Co-Operative Central Bank Bhd* [1989] 2 CLJ 584; [1989] 1 CLJ (Rep) 366; [1989] 3 MLJ 40 that grounds affecting the validity or correctness of the judgment or order appealed from are not special circumstances. Merits or strong ground for an appeal are also not special circumstances. The judgment in question being a money judgment, there is also no issue of the substratum of the appeal being destroyed if a stay of execution is not granted.

[57] The defendant's counsel also relied on the case of *Kerajaan Malaysia (Jabatan Kerja Raya) lwn. Tropical Profile Sdn Bhd & Satu Lagi Kes* [2010] 7 CLJ 176. In this case special circumstances existed as would justify the exercise of discretion in favour of the first defendant because the court was doubtful that the first defendant's position would not be adversely affected should the judgment turn to the plaintiff's favour, considering that there may not be enough money left then for the plaintiff to undertake the necessary repair work. However, the court went on to say that the plaintiff's affidavits adverting to their financial viability are insufficient to establish that the plaintiff could really reimburse the retention sum for the rectification works. Therefore, whether there exist special circumstances would surely depend on affidavit evidence to justify the granting of stay. In the instance case, from

the affidavit to evidence, I am satisfied that the disputed quantum of money may not constitute the "substratum" of the appeal which would be prejudicial to the defendant if disposed of.

[58] It is trite law that appellate court will be very slow to interfere with the finding of facts on damages made by the lower court. I agree with the plaintiff's submission and the Federal Court case of *Topaiwah v. Salleh* [1968] 1 LNS 161; [1968] 1 MLJ 284 had said that the court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. The assessments which the courts have made over the years form some guide to the kind of figure which is proper and which the court will follow in the light of the special facts of each particular case.

[59] It is the defendant's submission that the hearing of the assessment was conducted with affidavit evidence and not by way of trial, thus it is trite law that the merit of the appeal will be a ground to consider for a stay. In the instance case, there is no evidence adduced that the request for the assessment of damages to be conducted by way of oral testimony had been refused by the Senior Assistant Registrar or by the judge. In any event, it is my opinion that the issue of quotations in the attachments of exh. WKC1 and other relevant matters raised herein by the defendant, has been dealt with and considered during the assessment of damages proceeding and appeal to judge in chambers to which I believed those matters have been substantially argued.

[60] It is the defendant's contention that the plaintiff does not spend the judgment sum and incur any loss if stay is granted. I cannot accept such contention simply because I am of the view, whether the plaintiff is spending the money for the repair works and incurs any loss if stay is granted does not arise. The general proposition is that the court will not deprive a successful party of the fruits of his litigation.

[61] I agree with the plaintiff's submission that this application is not made promptly and an abuse of the court's process. The defendant did not make the application for a stay of execution promptly after the order dated 30 November 2012 was made. Instead, the defendant allowed a period of more than a month to elapse before filing the notice of application dated 3 January 2013 herein. The defendant did not prosecute this

notice of application dated 3 January 2013 promptly. Instead, the defendant has seen fit to commence a separate suit *vide* Kuala Lumpur High Court Civil Suit No. S-22NCVC-24-01/2013 for the purpose of obtaining an injunction to restrain the plaintiff from commencing any winding up proceeding. The failure of the defendant to make the application for stay of execution promptly has resulted in the plaintiff having already commenced execution against the defendant by way of winding up proceedings.

[62] There is also multiplicity of proceedings in respect of the same subject matter: the winding up petition *vide* Kuala Lumpur High Court Companies (Winding Up) No. 28NCC-27-01/2013, Kuala Lumpur High Court Civil Suit No. S-22NCVC-24-01/2013 and Kuala Lumpur High Court Suit No. S-22-498-2006. (See *Damayanti Kantilal Doshi & Ors v. Jigarlal Kantilal Doshi & Anor* [2002] 8 CLJ 218; [2001] 6 MLJ 417 where the conduct of the plaintiffs in instituting several proceedings in respect of the same subject matter was an abuse of process and therefore the interlocutory injunction could not be allowed to stand).

[63] The plaintiff having already commenced execution against the defendant by way of winding up proceedings and I am of the view that the right thing for the defendant to do is for the defendant to apply to the winding up court for a stay of the winding up proceedings instead of filing this application to which the effect could lead to a stay of the winding up proceedings.

[64] Finally, the balance of justice and/or the balance of convenience are not in favour of the defendant. On the facts, the grounds relied on by the defendant are nothing more than fear that it may be difficult for the defendant to recover the amount from the plaintiff in the event the defendant appeal is allowed by the Court of Appeal just because the plaintiff is under the control of receiver. This factor is not 'special circumstances' nor do they show that the appeal, if successful, will be rendered nugatory. They are nothing unusual. Execution is a natural process after obtaining a judgment. Based on the foregoing, the plaintiff ought not to be deprived of the fruits of its litigation.

[65] In conclusion, I dismissed this application in encl. 35 with cost.